FOO YIN CHOO & ANOR. v. FOO SIEW LAN & ORS.

[F.C. Ong C.J. (Malaya) Ali and Ong Hock Sim F.JJ.)
October 22, 1971]

[Ipoh — Federal Court Civil Appeal No. 10 of 1971]

Wills — Construction — Gift over on death of original legatees — Whether takes effect.

By his will the testator gave his adopted son Foo Yin Toon 1½ shares out of 10 shares in his residuary estate. The legatee, Foo Yin Toon, predeceased the testator, but the latter made no new will or codicil. The will provided that if the son of the testator died before the date of distribution, leaving issue, his share would go to such issue *per stirpes*, if more than one in equal shares; the learned trial judge held that Foo Yin Toon's share in the residuary estate had not lapsed. On appeal,

Held, dismissing the appeal: it was clearly the testator's intention that no residuary legatee's share should lapse if it was possible for the substitutional gift to take effect. In this case the share of Foo Yin Toon in the residuary estate did not lapse.

Cases referred to:

(1) *Ive* v. *King* 51 E.R. 693, 696.

(2) *Re Potter's Trust* L.R. 8 Eq. 52.

FEDERAL COURT.

N. T. Rajah for the appellants.

Lim Kean Chye (*M. Sivalingam* with him) for the respondents.

Ong C.J. (Malaya): The testator Foo Tsoon Tse died at Ipoh on June 17, 1950 having made a will on August 6, 1947 giving his adopted son, Foo Yin Toon, 1½ out of 10 shares in his residuary estate. This legatee was in China in 1947 but he returned subsequently to Ipoh where he died on July 2, 1949. Although he predeceased the testator by a year the latter made no new will or codicil.

The respondents, who are the daughters and son of Foo Yin Toon, commenced an action in 1969 against the surviving executors and trustees of the will for accounts and other reliefs. On October 16, 1970 the trustees took out a summons for determination of the question whether or not, under clauses 3 and 4 of the will of the testator, the share of Foo Yin Toon had lapsed by reason of his having predeceased the testator. On January 16, 1971 Chang Min Tat J. held that upon the true construction of the will the share of Foo Yin Toon had not lapsed and consequently the respondents, his children, are beneficiaries under the will. The appellants were ordered to pay the costs of the application personally. Against such decision the trustees have now appealed.

The relevant clauses in the will read as follows:-

"3. Upon the expiration of two (2) years from the date of my death irrespective of whether my elder adopted son Foo Yin Toon who is now in China has returned to Malaya or not to pay and distribute the residue of my estate including the share in the estate of Foo Nyit Tse alias Foo Yit Choo to which I am entitled, together with all the accumulated income thereof (if any), to and between the following persons in the share following that is to say:-

(I) My natural son FOO YIN CHOO 7½ shares

(II) My adopted son FOO YIN TOON 1½ shares

(III) My grandson FOO TAT KHEAN ½ share

(IV) My grandson FOO YIK THEAN ½ share

4. In the event of my natural son or my adopted son or either of my grandsons dying before the date of the distribution of my estate leaving issue either natural or adopted living at the said date such issue either natural or adopted shall take through all degrees according to their stocks in equal shares (if more than one) the shares which their parent would have taken if living at the said date of distribution and so capable of taking. In the event of my natural son or adopted son or either of my grandsons dying before the said date of distribution leaving no issue either natural or adopted his share shall be divided among my surviving natural son, adopted son and my grandsons in proportion to the shares to which they are entitled under this will. In the event of my natural son, adopted son or either of my grandsons dying without any issue either natural or adopted, but leaving a widow then my Trustees shall provide for her so long as she remains the widow of such natural son, adopted son or grandson, a monthly allowance which they in their absolute discretion shall consider reasonable."

The cardinal rule in the construction of a will is thus stated in 39 *Halsbury* (3rd Ed.) at page 975 as follows: —

"A will is, as a rule, generally construed in the same manner as any other document except that, in the case of a will, if the intention is shown, the mode of expression of that intention, and the form and language of the will, are unimportant. Thus, the want of the technical words which are necessary in some instruments for the purpose of giving expression to intention, or any error in grammar, or the want or inaccuracy of punctuation marks, is immaterial; in all such cases a benevolent construction is adopted.

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For the purpose of ascertaining the intention the will is read, in the first place, without reference to or regard to the consequences of any rule of law or of construction. The words of the will are given that meaning which is rendered necessary in the circumstances of the case by the context of the whole will, the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it. The will itself is taken as the dictionary from which the meaning of the words is ascertained, however inaccurate that meaning would be in ordinary legal use."

In the instant case I have no hesitation in holding, as the learned trial judge did, that Foo Yin Toon's share in the residuary estate had not lapsed. In my view the gift of the residue to the natural son, the adopted son and the two grandsons named took effect immediately on the death of the testator; it was only the distribution thereof which was postponed for two years. Clause 4 in unmistakable terms provides that should any of them die before the date of distribution, leaving issue, his share should go to such issue *per stirpes*, if more than one in equal shares. It was, therefore, clearly the testator's intention that no residuary legatee's share should lapse if it was possible for the substitutional gift to the issue to take effect. The fact that Foo Yin Toon predeceased the testator is irrelevant. Whether he died before the testator or before the date of distribution the gift over must take effect. On this point I think a useful precedent may be found in *Ive* v. *King*[1] in which Sir John Romilly M.R. said: —

"But if the original legacy be not to a class, but to a named individual legatee, with a direction that in case of death of the legatee before payment, the legacy is to go to another person, although the death of the legatee occurs before the death of the testator, the gift over takes effect, upon the presumption that such ulterior legatee was substituted, in order to prevent a lapse of the legacy."

In *Re Potter's Trust*[2] there was a gift of one-fourth of the testator's residuary estate to the family of his sister Mary Lamb, with this proviso: "And in case of the death of any of my said nephews and nieces, then I direct that such issue shall take the share that his, her, or their deceased parent would have taken if living." In his judgment Malins V.C. said: —

"Now here there can be no doubt that the testator's intention was to give to his nephews and nieces, the children of Mary Lamb, and also to substitute the children for the parent with respect to those nephews and nieces who died at some period after his own death, but before the period of distribution. Suppose that some were actually dead at the time of the testator's death, but the fact was unknown to him, and that there were others who died after him; is there any probability that he intended to shew greater favour to the latter than to the former? Take the common case of a gift by a parent to his children of definite parts of his whole property, followed by the words: 'But if any of them shall die then I give it to their issue, the issue of those who are dead to take the shares which their parents would have taken if living.' Can it be supposed that he had less affection for those grandchildren whose parents predeceased him, but whose death he did not know of, than for those whose parents survived him? There is no ground for such a supposition. If the intention is to exclude grandchildren whose parents are dead at any particular period, there ought to be something to shew it; there is nothing of the kind in this will."

After referring to various authorities the judgment concluded as follows: —

"The result, then, of the authorities is, that a child of a nephew or niece who was dead at the date of the will is as much entitled to take as the child of a nephew or niece who died after that time, but before the testator, and that in both cases the child will be substituted for its parent. Desiring, as I now do, to put the law on a rational footing, in my opinion there ought not to be any distinction between a gift to persons as a class and a gift to them as individuals; and, therefore, where the testator makes a bequest, as in the present case, to nephews and nieces, with a substitutionary gift over to the issue of any who shall die, the issue should take what the parent would have taken if living at the death of the testator, such being the testator's positive intention. The result is the same whether the parent dies before the date of the will, or after that time and before the testator, unless the will shews a contrary intention. The children of all the nephews and nieces who died in the testator's lifetime will therefore take what their respective parents would have taken if living at his death."

For the same reasons as set out in the above cases I am of opinion that the learned trial judge was right in the view he took and this appeal should be dismissed.

There remains only the question whether the appellants should personally bear the costs of the application in the court below. In my view it is only fair that all costs of the parties should be taxed as between solicitor and client and paid out of the funds of the testator's estate. This is the general rule unless there are special reasons for depriving the trustees of their costs. It would appear that they had, in fact, been of the same opinion as the court until their solicitors advised them, as a precautionary measure for protecting themselves, to apply to the court for directions. It is true, as the learned trial judge said, that the appellants had waited for 20 years before seeking an interpretation of the will, but they are laymen who had in fact been taking legal advice at all times and the delay is not strictly speaking their own fault. The order of the court below will accordingly be varied only in respect of the order as to costs.

Ali and **Ong Hock Sim F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Lim Cheng Ean & Co.*

HONGKONG & SHANGHAI BANKING CORPORATION, IPOH v. RENT TRIBUNAL FOR ULU KINTA & ORS.

[F.C. (Ong C.J. (Malaya,) Ali and Ong Hock Sim F.JJ.)

October 22, 1971]

[Ipoh — Federal Court Civil Appeal No. 61 of 1971]

Administrative Law — Certiorari — Application to quash order of Rent Tribunal — Findings of fact where there is evidence to support conclusions — Control of Rent Act, 1966, s. 23.

Landlord and Tenant — Lease — Expiration of — Whether new monthly tenancy created — Application to decontrol premises — Refusal of Rent Tribunal to grant certificate of decontrol — Right of appeal — Control of Rent Act, 1966, ss. 12, 13 and 23.

Practice and Procedure — Jurisdiction — Notice of appeal from decision of Rent Tribunal to Appeal Board on record — Whether High Court can entertain application for certiorari simultaneously.

This was an appeal from the decision of Chang Min Tat J. who had dismissed the application of the appellants for an order of *certiorari* as he was of opinion that on the evidence before the Rent Tribunal, it was justified in finding as a fact that a monthly tenancy had superseded after the expiry of the lease.

Held, dismissing the appeal: the Rent Tribunal was amply justified in finding as a fact that there was a consensual monthly tenancy accepted by both parties, and therefore there was no reason to disturb the Rent Tribunal's decision.

Cases referred to:-

(1) *Edwards* v. *Bairstow* [1955] 3 W.L.R. 410, 423.

(2) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118 at p. 121.

(3) *Badat bin Drani* v. *Tan Kheat* [1953] M.L.J. 67.

(4) *Melayu Raya Press Ltd.* v. *Blythe* [1951] M.L.J. 89.

FEDERAL COURT.

J. J. Puthucheary for the appellants.

M. Sivalingam for the first respondent.

R. R. Chelliah for the third respondent.

Ong C.J. (Malaya): The Hongkong and Shanghai Banking Corporation are the owners and landlords of Hongkong Bank Chambers in Ipoh, of which the first and second floors had been let to Gibb & Co., a firm of advocates and solicitors for many years under successive leases. The last lease was for 3 years, expiring on March 31, 1968. An option therein for renewal was not exercised by the tenants.

The Control of Rent Act 1966 came into force on January 1, 1967. Section 23 provides for decontrol of rent-controlled premises, as follows: —